

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

No. CR 13-00794 WHA

v.

DAVID ANDREW MARTINEZ,
RUBEN ALEJANDRO QUIROZ, CESAR
CASTELLANOS, and SAMUEL
TEWOLDE,

**ORDER RE MOTION TO
EXCLUDE GOVERNMENT'S
(1) CELLSITE, (2) GUNSHOT
RESIDUE, AND (3) DRUG
DISTRIBUTION EXPERTS**

Defendants.

INTRODUCTION

In this criminal RICO action, defendant David Andrew Martinez moves to exclude the testimony of the government's cellsite, gunshot residue, and drug distribution experts. For the reasons stated below, defendant's motion is **GRANTED IN PART AND DENIED IN PART**.

STATEMENT

In its FRCrP 16(a)(1)(G) expert disclosure to defendants, the government identified: (1) Special Agent Michael Easter, of the FBI's Cellular Analysis Survey Team, as its cellsite expert; (2) Debra Kowal as its gunshot residue expert; and (3) DEA Special Agent David Mateer as its

1 drug distribution expert. The government provided its initial expert disclosures on August 26,
2 2014, and supplemented these disclosures on September 16.*

3 ANALYSIS

4 FRCrP 16(a)(1)(G) requires that the government provide a summary of the opinions of its
5 experts to be used during its case-in-chief. The rule states that “[t]he summary provided under
6 this subparagraph must describe the witness’s opinions, the bases and reasons for those opinions,
7 and the witness’s qualifications.” Furthermore, “FRCrP 16(a)(1)(G) does not require the
8 disclosure of the actual materials relied on by an expert — instead, it entitles defense counsel to
9 a written summary of the witness's opinions, bases and reasons for those opinions, and
10 qualifications. The rule does not require production of the raw materials constituting the bases
11 of an expert's opinions.” *United States v. Herrera*, No. CR 08–0730, 2010 WL 5396015, at *1
12 (N.D. Cal. Dec. 23, 2010).

13 1. CELLSITE EXPERT EASTER.

14 This order finds that the government’s disclosure regarding cellsite expert Easter is
15 sufficient. The disclosure stated that the cellsite expert will testify regarding: (1) how cellular
16 telephones and cellular networks operate; (2) the information contained in cellular telephone
17 records, also known as call detail records; and (3) that it is possible to approximate to a fair
18 degree of accuracy the location of a cellular telephone based on information contained in call
19 detail records, based on the cellsite location accessed for a particular call, along with any
20 attendant cell sector information. Moreover, as discussed at oral argument and by the parties’
21 stipulation, the government will provide the defense with the cellsite expert’s full report 30 days
22 before trial.

23 The disclosure explained that the expert will also testify that he conducted cellsite
24 location analysis for defendants’ cell phones during the time of the events in question. The
25 government has provided the defense with the underlying data regarding Easter’s testimony.

26
27 * The government originally notified the defense that it would call Special Agent Sean Hansen, also
28 of the FBI’s Cellular Analysis Survey Team, as its cellsite expert. The government has since notified the
defense that Agent Easter will testify in Agent Hansen’s place, due to a family emergency. The government has
provided the defense with Agent Easter’s CV.

1 This includes data showing the location of pertinent cell phones during the events in question.
2 The parties have also agreed that the government will provide the defense with the final
3 historical cellsite analysis report that will be used at trial thirty days before the trial date (*see*
4 Dkt. No. 243).

5 Furthermore, at the *Daubert* hearing on Detective Travis Menke's expert testimony, the
6 undersigned judge made the following tentative ruling regarding the government's cellsite expert
7 disclosure (Dkt. No. 220 at 225):

8 I'm not going to require more than this . . . it's possible that at trial I will exclude
9 it as being — I don't know enough about it at this point to say that this is
inadequate. It could be enough. But if it turns out at trial that you've
10 sandbagged them and not given them enough information to do their job, then
I'm just going to say to the jury, "it all goes out."

11 This order reaffirms that tentative ruling. The government's disclosure satisfies the
12 standard set forth in FRCrP 16. If, however, it becomes apparent at trial that the disclosure was
13 insufficient for the testimony actually laid before the jury, then the testimony will be excluded
14 and the jury will be instructed to disregard it.

15 Defendant argues that the disclosure is insufficient because the expert had not yet, as of
16 September 16, determined the relationship between the locations of interest and the cell towers.
17 The government's disclosure states: "TFO Hansen will go to those locations to determine which
18 cell towers are used at those locations." Based on this sentence, defendant argues that the expert
19 has not yet conducted sufficient analysis. Furthermore, defendant requests that the government
20 provide: (1) a more detailed technical forensic report; (2) a comprehensive document detailing
21 the method, equipment, and processes the expert used; (3) the electronic surveillance technology
22 used; (4) more details regarding how the government intends to prove that the specific cell
23 phones at issue were used; and (5) exhibits the government intends to use at trial plotting the
24 locations and usages of the cell phones at issue.

25 Defendant's requests are unreasonable and go beyond what is required by FRCrP 16.
26 The rule requires a summary of the witness's opinions, the bases for those opinion, and the
27 witness's qualifications. It does not require specific details, data, and exhibits on every subject
28

1 the witness may testify about. Again, if at trial the testimony exceeds the government's
2 disclosure, then the excess testimony will be excluded.

3 **2. GUNSHOT RESIDUE EXPERT KOWAL.**

4 Similar to the government's cellsite expert disclosure, the government's disclosure
5 regarding gunshot residue expert Kowal was sufficient. The Kowal disclosure described that she
6 will testify that particles consistent with gunshot residue — containing lead, barium, and/or
7 antimony — were found in the vehicle involved in one of the robberies at issue. The
8 government also provided Kowal's bench notes, which describe her expert analysis of every
9 gunshot particle found at the crime scenes she examined for this case. These bench notes had
10 not been provided to the defense when the instant motion was filed, but have since been
11 provided.

12 Defendant generally argues that the government's disclosure fell short on details. This
13 order disagrees. If it is shown at trial that the government has sandbagged the defense in relation
14 to this expert, the testimony will be excluded.

15 **3. DRUG DISTRIBUTION EXPERT MATEER.**

16 Defendant does not challenge Mateer's qualifications as an expert. Rather, defendant
17 argues that the government's disclosure regarding Mateer is overbroad and contains irrelevant
18 opinions. The Court has read the disclosure and overrules all objections tendered, without
19 prejudice to more specific objections at trial, with the exception of defendant's objections to the
20 following opinions:

- 21 • In his experience of interacting with and interviewing heavy methamphetamine users, he
22 has observed that they are routinely underweight, have visibly bad skin and teeth, and
23 have a disheveled appearance.
- 24 • When a person is found to have a large number of doses of more than one drug (such as
25 methamphetamine and heroin), that is more consistent with drug dealing than with
26 personal use.
- 27 • When a person is found to have a large number of doses of methamphetamine as well as
28 a firearm, that is more consistent with drug dealing than with personal use.
- When a person is found to have a large number of doses of more than one drug (such as
methamphetamine and heroin), as well as a firearm, and to be in possession of valuable
assets such as an expensive automobile, that is more consistent with drug dealing than
with personal use.

1 Mateer will not be permitted to testify to these opinions without further foundation and
2 limitation. He will, however, be permitted to testify concerning the customary quantity of doses
3 possessed by street dealers.

4 Additionally, this order is concerned about the following two opinions Mateer intends to
5 proffer:

- 6
- 7 • Dealers also often take precautions by carrying weapons, including firearms, with their
narcotics.
 - 8 • Dealers often store weapons, including firearms, with the narcotics, so that they can be
9 accessed together.

10 For now, these two opinions will be held in abeyance until we see the foundation the government
11 lays at trial for these opinions.

12 CONCLUSION

13 For the reasons stated above, defendant's motion to exclude the testimony of the
14 government's cellsite, gun residue, and drug distribution experts is **GRANTED IN PART AND**
15 **DENIED IN PART**. Defendant's objections to the government's disclosures regarding the cellsite
16 and gun residue experts are overruled. The government's drug distribution expert's testimony
17 will be limited to the opinions described above. If it becomes apparent at trial that the
18 government's disclosures were insufficient, or if the experts veer off into the province of the jury
19 during trial, the testimony will be excluded and the jury will be instructed to disregard the
20 improper statements.

21 **IT IS SO ORDERED.**

22
23 Dated: January 30, 2015.

24 
25 WILLIAM ALSUP
26 UNITED STATES DISTRICT JUDGE
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